

1 that: (a) uses a third party's internet domain name without
2 permission of the third party, or otherwise misrepresents or obscures
3 any information in identifying the point of origin or the
4 transmission of a commercial electronic mail message; or (b) contains
5 false or misleading information in the subject line.²

6 Defendant argues that a claim under RCW § 19.190 "sounds in"
7 fraud because the express language of the statute speaks to acts that
8 "misrepresent", "mislead", contain "falsities", and/or "obscure"
9 information. Although the Court concluded Plaintiff's claims under
10 Washington's Commercial Electronic Mail Act were not preempted by the
11 federal CAN-SPAM Act because the Washington Act prohibits falsity and
12 deception, this does not require the Court also conclude that
13 Plaintiff's Complaint "sounds in fraud". Rather, the Court
14 determines that a comparison of the elements of RCW § 19.190.020 with
15 the elements of fraud, illustrates that Plaintiff's Complaint does
16 not sound in fraud. There is no requirement under RCW § 19.190.020
17 that the sender "know" that the information in the subject line or
18 transmission path of the email is "false or misleading". Also, RCW
19 § 19.190.020 does not require the false or misleading information in
20 the subject line or transmission path be "material". Further, RCW
21 § 19.190.020 does not require the recipient of an email that violates
22

23 ² Although Plaintiff's Complaint also alleges a claim under
24 RCW § 19.190.030 and Washington's CPA, the only issue with
25 respect to the application of Rule 9(b) is whether a claim for a
26 violation of RCW § 19.190.020 triggers the heightened pleading
requirements of Rule 9(b) because RCW § 19.190.030 merely states
that a violation of RCW § 19.190.020 is a violation of
Washington's CPA.

1 the statute take any action "in reliance upon the representation" in
2 the email. Neither intent on the part of the sender, nor detrimental
3 reliance on the part of the recipient, is required to prove a
4 violation of RCW § 19.190.020, like it is required to prove fraud.
5 Therefore, the Court concludes that Plaintiff's claims under
6 Washington's Commercial Electronic Mail Act do not trigger the
7 heightened pleading requirements of Rule 9(b).

8 **IV. Doctrine of Res Judicata**

9 Defendant moves to dismiss Plaintiff's Complaint on the basis
10 that the claims are barred by the doctrine of res judicata. Res
11 judicata, also known as claim preclusion, bars litigation in a
12 subsequent action of any claims that were litigated or could have
13 been asserted in a prior action. *Owens v. Kaiser Found. Health Plan,*
14 *Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). Res judicata applies where
15 there is (1) a final judgment on the merits, (2) an identity of
16 claims, and (3) identity or privity between parties. *Id.* If any of
17 these three factors are not met, res judicata is inapplicable. *City*
18 *of Martinez v. Texaco Trading and Transp.*, 353 F.3d 758, 762 (9th
19 Cir. 2003).

20 A. *Final Judgment*

21 The phrase "final judgment on the merits" is often used
22 interchangeably with "dismissal with prejudice". *Stewart v. United*
23 *States Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002); *see also Int'l*
24 *Union of Operating Eng'rs-Employers Constr. Indus. Pension v. Karr*,
25 994 F.2d 1426, 1429 (9th Cir. 1993) (noting that the dismissal of an

1 action with prejudice constitutes a final judgment on the merits and
2 precludes a party from reasserting the same claims in a subsequent
3 action). Here, the Related Action was dismissed with prejudice.
4 Therefore, the first factor is met because there has been a final
5 judgment on the merits.

6 *B. Same Claims*

7 The Ninth Circuit looks to the following criteria in determining
8 whether the claims asserted in successive lawsuits are sufficiently
9 identical: "(1) whether rights or interests established in the prior
10 judgment would be destroyed or impaired by prosecution of the second
11 action; (2) whether substantially the same evidence is presented in
12 the two actions; (3) whether the two suits involve infringement of
13 the same right; and (4) whether the two suits arise out of the same
14 transactional nucleus of facts." *Costantini v. Trans World Airlines*,
15 681 F.2d 1199, 1201 (9th Cir. 1982). These factors are considered
16 "tools of analysis, not requirements." *Karr*, 994 F.2d at 1430.
17 However, the last of these criteria is considered the most important.
18 *Costantini*, 681 F.2d at 1202. Here, the parties acknowledge that
19 both actions involve infringement of the same right. Plaintiff's
20 Complaint in the present action and the complaint in the Related
21 Action both allege violations of the same statutes. Further, it
22 appears that much of the same evidence presented in the Related
23 Action will be presented in this action. Therefore, the issue
24 centers on the most important factor; whether the two suits arise out
25 of the same transaction or nucleus of facts.

26 In determining whether two events are part of the same
ORDER DENYING DEFENDANT'S MOTION TO DISMISS - 15

1 transaction, the Court considers whether they are "related to the
2 same set of facts and whether they could conveniently be tried
3 together." *Karr*, 994 F.2d at 1429. Here, Defendant argues this
4 action arises out of the same nucleus of facts as the Related Action
5 because both actions involve the same emails. However, Plaintiff
6 adamantly contests this assertion. Plaintiff contends the emails
7 supporting his claims against Defendant comprise three categories:
8 (1) emails sent by Defendant offering products from companies other
9 than CMG; (2) emails sent by Defendant after the Related Action was
10 dismissed; and (3) emails that were in fact part of the basis for
11 Plaintiff's claims against CMG. Both parties' arguments are
12 supported by declarations. These declarations constitute material
13 beyond the pleadings, which the Court may not consider in ruling on a
14 Rule 12(b) (6) motion. *Lee*, 250 F.3d at 688.

15 Because Plaintiff's Complaint does not identify the emails
16 supporting his claims against Defendant, the Court cannot determine
17 whether this action arises out of the same transaction or nucleus of
18 facts as the Related Action. Therefore, the Court cannot determine
19 whether Plaintiff's Complaint is barred by res judicata until
20 Plaintiff identifies the specific emails supporting his claims
21 against Defendant. Accordingly, to the extent that Defendant's
22 motion to dismiss is based on the argument that Plaintiff's claims
23 are barred by res judicata, the motion is denied. Accordingly,

24 **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss, Ct.
25 Rec. 2, is **DENIED**. The Defendant shall file its Answer to
26 Plaintiff's Complaint within 20 days of the entry of this Order.

1 //

2 **IT IS SO ORDERED.** The District Court Executive is hereby
3 directed to enter this Order and furnish copies to counsel.

4 **DATED** this 11th day of July, 2005.

5
6 s/ Fred Van Sickle

7 Fred Van Sickle

8 Chief United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES S. GORDON, JR., an individual,

No. CV-05-5079-FVS

Plaintiff,

V.

ASCENTIVE, LLC, a Delaware
Limited Liability Company,

ORDER DENYING MOTION TO
DISMISS FOR LACK OF
JURISDICTION

Defendant.

BEFORE THE COURT is Defendant's Motion to Dismiss for Lack of Jurisdiction, Ct. Rec. 10, and Defendant's Motion to Strike Portions of the Declaration of James Gordon, Jr., Ct. Rec. 26. The Court heard oral argument on December 9, 2005. Defendant was represented by Floyd Ivey. Plaintiff was represented by Douglas McKinley.

I. BACKGROUND

Defendant, Ascentive, LLC, is a Delaware limited liability company that makes personal computer software. The company has a web site through which its customers can purchase its products. Customers can also call the telephone number on the web site and place an order. Defendant's principle place of business is Philadelphia, Pennsylvania, and it does not have an office in Washington.

Plaintiff, James Gordon, is a Washington resident and the

1 registered user of the internet domain name "Gordonworks.com."
2 Plaintiff alleges Defendant violated Washington's Commercial
3 Electronic Mail Act, RCW § 19.190 et seq., and Washington's Consumer
4 Protection Act, RCW § 19.86 et seq., by initiating and/or conspiring
5 with others to initiate unsolicited commercial emails to Plaintiff.
6 Complaint, at ¶ 2.3.

7 **II. DISCUSSION**

8 Defendant moves to dismiss Plaintiff's Complaint under Federal
9 Rule of Civil Procedure 12(b) (2) for lack of personal jurisdiction.
10 Defendant also moves to strike a portion of Plaintiff's declaration
11 submitted in opposition to Defendant's motion to dismiss.

12 **A. Motion to Strike**

13 Defendant moves to strike the following statement from
14 Plaintiff's declaration submitted in opposition to Defendant's motion
15 to dismiss: "I subsequently received over 500 email messages sent by
16 the Defendant and/or others acting on behalf of the Defendant, each
17 of which advertised the Defendant's software products." Declaration
18 of James S. Gordon, Jr., at ¶ 5. Defendant moves to strike this
19 statement on the basis that it "comprises legal conclusions,
20 statements of opinions, is without foundation, does not demonstrate
21 personal knowledge or show competency to provide such testimony."
22 The Court determines Plaintiff is competent to testify that he
23 received email messages from the Defendant and such testimony would
24 be within Plaintiff's personal knowledge. But Plaintiff does not
25 have personal knowledge as to whether someone, acting on behalf of
26 the Defendant, sent Plaintiff emails. Thus, the Court strikes the

1 following portion from Plaintiff's statement: "and/or others acting
2 on behalf of Defendant."

3 ***B. Procedure for Resolving Jurisdiction Dispute***

4 Plaintiff bears the burden of establishing that personal
5 jurisdiction exists. *Rio Props., Inc. v. Rio Int'l Interlink*, 284
6 F.3d 1007, 1019 (9th Cir. 2002) (citation omitted). Where, as here,
7 the Court is asked to resolve the motion on the parties' briefs and
8 affidavits, rather than hold an evidentiary hearing, Plaintiff need
9 only make a *prima facie* showing of personal jurisdiction. *Rano v.*
10 *Sipa Press, Inc.*, 987 F.2d 580 n. 3 (9th Cir. 1993). "That is, the
11 plaintiff need only demonstrate facts that if true would support
12 jurisdiction over the defendant." *Doe v. Unocal Corp.*, 248 F.3d 915,
13 922 (9th Cir. 2001) (quotations and citation omitted). In
14 determining whether Plaintiff has made a *prima facie* showing, the
15 Court is bound by the following principles: (1) uncontested
16 allegations in Plaintiff's Complaint are taken as true; (2) conflicts
17 between the facts contained in the parties' affidavits must be
18 resolved in Plaintiff's favor; and (3) all evidentiary materials are
19 construed in the light most favorable to Plaintiff. *Ochoa v. J.B.*
20 *Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1187 (9th Cir. 2002).

21 ***C. Governing Law***

22 The Court's exercise of personal jurisdiction over a nonresident
23 must comport both with Washington's long-arm statute and with federal
24 constitutional requirements of due process. *Chan v. Soc'y*
25 *Expeditions*, 39 F.3d 1398, 1404-05 (9th Cir. 1994). Washington's
26 long-arm statute confers personal jurisdiction to the extent federal

1 due process allows. *Id.* at 1405. Thus, the jurisdictional inquiry
2 collapses into a single analysis of due process. *Id.* Absent
3 traditional bases for personal jurisdiction (physical presence,
4 domicile or consent), due process requirements are satisfied when the
5 defendant has "certain minimum contacts with the forum such that the
6 maintenance of the suit does not offend traditional notions of fair
7 play and substantial justice." *Helicopteros Nacionales de Columbia*
8 *S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d
9 (1984) (quotations omitted) (citing *Int'l Shoe Co. v. Washington*, 326
10 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). Personal
11 jurisdiction may be general or specific. *Sher v. Johnson*, 911 F.2d
12 1357, 1361 (9th Cir. 1990) (citations omitted).

13 ***D. General Versus Specific Jurisdiction***

14 General jurisdiction over a nonresident defendant exists when
15 the defendant's activities in the state are "so substantial and
16 continuous that justice allows the exercise of jurisdiction even for
17 claims not arising from the defendant's contacts with the state."
18 *Raymond v. Robinson*, 104 Wash. App. 627, 633, 15 P.3d 697, 699 (Div.
19 2, 2001); *Helicopteros Nacionales*, 466 U.S. at 414-16, 104 S.Ct. at
20 1872. RCW 4.28.080(10) authorizes general jurisdiction over a
21 nonresident defendant if the defendant is transacting substantial and
22 continuous business within Washington. See e.g., *Hein v. Taco Bell,*
23 *Inc.*, 60 Wash. App. 325, 38-29, 803 P.2d 329 (1991) (noting that RCW
24 4.28.080(10) creates general jurisdiction). On the other hand,
25 specific jurisdiction requires a showing that the defendant purposely
26 established significant contacts with Washington, and that the cause

1 of action arises out of or is related to those contacts. *Burger King*
2 *Corp. v. Rudzewicz*, 471 U.S. 462, 471-73, 105 S.Ct. 2174, 2181-83, 85
3 L.Ed.2d 528 (1985). Specific jurisdiction is created by RCW
4 4.28.185. See e.g., *Raymond*, 104 Wash. App. at 636-37, 15 P.3d at
5 701-02 (2001).

6 In the present case, neither party addresses the distinctions
7 between general and specific jurisdiction. Therefore, since the
8 assertion of specific jurisdiction requires a lower threshold of
9 contacts than does general jurisdiction, the Court only addresses
10 whether it can exercise specific jurisdiction. Plaintiff argues
11 jurisdiction exists under Washington's long-arm statute, RCW
12 4.28.185(1)(a), because Defendant regularly transacts business within
13 the State of Washington. Complaint, at ¶¶ 2.1 and 2.2. RCW
14 4.28.185(1)(a) provides in part:

15 (1) Any person, whether or not a citizen or resident of
16 this state, who in person or through an agent does any of
17 the acts in this section enumerated, thereby submits said
person ... to the jurisdiction of the courts of this state
as to any cause of action arising from the doing of any of
the said acts:

18 (a) The transaction of any business within this state.

19 To establish that specific jurisdiction exists under the
20 transaction of business portion of Washington's long-arm statute, RCW
21 4.28.185(1)(a), Plaintiff must establish three factors: (1) Defendant
22 must have purposefully done some act or consummated some transaction
23 in Washington; (2) Plaintiff's cause of action must arise from, or be
24 connected with, such act or transaction; and (3) the exercise of
25 jurisdiction must be reasonable in that it must not offend
26 traditional notions of fair play and substantial justice. *Raymond*,

1 104 Wash.App. at 637, 15 P.3d at 702 (citing *Shute v. Carnival Cruise*
2 *Lines*, 113 Wash.2d 763, 767, 783 P.2d 78 (1999)). Plaintiff bears
3 the burden of satisfying the first two prongs of the test, and if he
4 succeeds, the burden shifts to Defendant to present a compelling case
5 that the exercise of jurisdiction would be unreasonable.

6 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir.
7 2004).

8 **1. Purposeful Act**

9 To satisfy the first factor, Plaintiff must establish that
10 Defendant purposefully availed itself of the privilege of conducting
11 activities in Washington state, thereby invoking the benefits and
12 protections of its laws. *Raymond*, 104 Wash. App. at 636, 15 P.3d at
13 702; *Burger King*, 471 U.S. at 475, 105 S.Ct. at 2183. The focus of
14 this inquiry is on the quality and nature of Defendant's activities
15 in Washington, rather than the number of acts within the state or
16 some other mechanical standard. *Raymond*, 104 Wash. App. at 636, 15
17 P.3d at 702. (citation omitted). This protects against a non-
18 resident defendant being haled into local courts solely as the result
19 of "random, fortuitous or attenuated" contacts. *Burger King*, 471
20 U.S. at 475, 105 S.Ct. at 2183.

21 Here, Plaintiff alleges the Court should exercise specific
22 jurisdiction over Defendant because the Defendant allegedly sent
23 multiple commercial email messages to Plaintiff. Plaintiff further
24 alleges Defendant had actual knowledge that Plaintiff was a
25 Washington resident and that Defendant's emails violated Washington
26 law. To support this argument, Plaintiff points to the following

1 email he received from Mr. Schram, Manager of Ascentive. The email
2 reads, in pertinent part:

3 Thank you for forwarding your spam complaint. As a
4 software company based in Philadelphia, we have a number of
marketers that buy advertising to promote our software. We
are totally opposed to UCE (we rarely email our own
5 customers) and terminate partners that receive well-
grounded UCE complaints. For example, see
6 <http://www.ascedntive.com/run/click/karizma>

7 We have terminated over 20 partner accounts for spamming to
date. Could you please forward the entire original email,
8 if you still have it, in HTML format (if that's how you
received it?) So we can investigate the source of the
9 email. I have on my desk the message headers for the UCE's
you received. Please feel free to call me at the # below
10 if you have any questions.

11 Best regards,

12 Adam Schran, CEO
13 Ascentive - <http://www.ascentive.com>

14 Plaintiff received this email in response to a letter he wrote
15 informing Defendant that Plaintiff was a Washington resident who was
16 receiving commercial email messages sent by Defendant. Plaintiff
17 alleges that after this exchange between the parties, he
18 "subsequently received over 500 email messages sent by the Defendant
19 ... each of which advertised the Defendant's software products."

20 Declaration of James S. Gordon, Jr., at ¶ 5.

21 Although Defendant denies sending commercial emails to
22 Plaintiff, conflicts between the facts contained in the parties'
23 affidavits must be resolved in Plaintiff's favor. *Ochoa*, 287 F.3d at
24 1187. Plaintiff's declaration demonstrates the existence of facts
25 that, if proven, are sufficient to satisfy the purposeful availment
26 requirement for the exercise of personal jurisdiction. Assuming the
truth of the allegations in Plaintiff's Complaint, Defendant was

1 "doing business" in Washington when it sent unsolicited commercial
2 emails advertising its products to Plaintiff in an attempt to solicit
3 business for its website. Thus, Defendant committed a purposeful act
4 that occurred in Washington, just as if it had sent a letter to
5 Plaintiff advertising a particular product or service. Further,
6 Plaintiff has alleged Defendant sent these emails after being
7 notified that Plaintiff was a Washington resident and that the emails
8 were in violation of Washington law. Therefore, Defendant should
9 have reasonably expected to be haled into a court in Washington for
10 violation of its laws. Thus, the Court concludes Plaintiff has made
11 a *prima facie* showing that Defendant purposefully availed itself of
12 doing business within Washington state.

13 **2. Arising From**

14 Washington courts apply the "but for" test to determine whether
15 a claim against a nonresident business arises from, or is connected
16 with, its solicitation of business within Washington, thereby
17 satisfying the second prong of the specific jurisdiction test.

18 *Raymond*, 104 Wash. App. at 640, 15 P.3d at 703 (citations omitted).
19 This factor is established if the events giving rise to the claim
20 would not have occurred "but for" the defendant's actions within the
21 forum state. *Id.* The "but for" test preserves the requirement that
22 there be some nexus between the cause of action and the defendant's
23 activities in the forum state. *Id.*

24 Here, Plaintiff has satisfied the "but for" test since it is the
25 very act of sending commercial emails to Plaintiff at a Washington
26 email address that gives rise to Plaintiff's cause of action under

1 RCW 19.190 et seq. Thus, Plaintiff's cause of action arises from
2 Defendant's actions in Washington state.

3 **3. Personal Jurisdiction is Reasonable**

4 Finally, due process requires that the exercise of personal
5 jurisdiction over a nonresident defendant be reasonable. Defendant
6 bears the burden of demonstrating unreasonableness and must put on a
7 "compelling case." *Roth v. Garcia Marquez*, 942 F.2d 617, 625 (9th
8 Cir. 1991); *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2185.

9 However, Defendant has not met this burden and the Court is unaware
10 of any factors demonstrating a compelling case for why the Court's
11 exercise of personal jurisdiction over Defendant would be
12 unreasonable.

13 **III. CONCLUSION**

14 Plaintiff has established a *prima facie* case that specific
15 jurisdiction exists under the transaction of business portion of
16 Washington's long-arm statute, RCW 4.28.185(1)(a). Thus, Plaintiff's
17 allegations set forth in his declaration are sufficient to avoid a
18 motion to dismiss. *Data Disc, Inc. v. Sys. Tech. Assocs. Inc.*, 557
19 F.2d 1280, 1285 (9th Cir. 1977). Accordingly, Defendant's motion to
20 dismiss for lack of personal jurisdiction is denied. However, since
21 the affidavits submitted by Defendant raise disputed questions of
22 fact with regard to jurisdiction, the Court has the discretion to
23 hold an evidentiary hearing prior to a trial on the merits in order
24 to resolve the contested issues. *Stewart v. Ragland*, 934 F.2d 1033,
25 1036 n. 5 (9th Cir. 1991). In that situation, Plaintiff would bear
26 the burden of proving facts supporting the exercise of personal

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1 jurisdiction by a preponderance of the evidence. *Data Disc*, 557 F.2d
2 at 1285. Since the jurisdictional issues here are intertwined with
3 the merits, the Court will determine the jurisdiction issue at trial,
4 where Plaintiff "may present his case in a coherent, orderly fashion
5 and without the risk of prejudicing his case on the merits." *Id.* at
6 1285 n. 2.

7 **IT IS HEREBY ORDERED:**

8 1. Defendant's Motion to Dismiss for Lack of Jurisdiction, **Ct.**
9 **Rec. 10**, is **DENIED**.

10 2. Defendant's Motion to Strike Portions of the Declaration of
11 James Gordon, Jr., **Ct. Rec. 26**, is **GRANTED IN PART AND DENIED IN**
12 **PART**.

13 **IT IS SO ORDERED.** The District Court Executive is hereby
14 directed to enter this Order and furnish copies to counsel.

15 **DATED** this 15th day of December, 2005.

16 _____
17 s/ Fred Van Sickle
18 Fred Van Sickle
19 United States District Judge
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